

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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UNITED STATES OF AMERICA, v. DOUGLAS HAIG,	Plaintiff(s), Defendant(s).	Case No. 2:18-CR-256 JCM (VCF) ORDER
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Presently before the court is Magistrate Judge Cam Ferenbach's report and recommendation. (ECF No. 61). Defendant Douglas Haig filed an objection (ECF No. 62) and plaintiff United States of America ("the government") filed a response (ECF No. 63).

Also before the court is Haig's motion to dismiss. (ECF No. 45). The government filed a response (ECF No. 51), to which Haig replied (ECF No. 57).

I. Facts

This action arises from the investigation into the October 1, 2017, mass shooting, where Stephen Paddock opened fire on a crowd of over twenty-two thousand (22,000) concertgoers at the Route 91 Harvest music festival on 3901 South Las Vegas Boulevard, Las Vegas, Nevada. (ECF No. 1).

On the evening of October 1, 2017, Paddock positioned himself in rooms 134 and 135 on the 32nd floor of the Mandalay Bay Resort and Casino, which were in an elevated position overlooking the concert venue. *Id.* Paddock brought with him a remarkable arsenal including over twenty (20) firearms, hundreds of rounds of ammunition (mostly in preloaded high-capacity magazines), and range finding devices. *Id.* At approximately 10:05 p.m., Paddock used these

1 weapons to attack the concertgoers from his hotel rooms, killing fifty-eight (58) and injuring eight
2 hundred and sixty-nine (869) people.¹

3 After obtaining and executing search warrants on Paddock's hotel rooms, law enforcement
4 officials found Paddock's body, the weapons, and hundreds of rounds of spent ammunition. *Id.*
5 The officers and agents also found an Amazon.com cardboard shipping box in the hotel rooms,
6 marked with the name Douglas Haig and the address 4323 East Encanto Street, Mesa, Arizona.
7 *Id.*

8 On October 2, 2017, and October 5, 2017, Bureau of Alcohol, Tobacco, Firearms and
9 Explosives ("ATF") agents and Federal Bureau of Investigation ("FBI") agents arranged
10 interviews with Douglas Haig and his business partner (hereinafter "Associate"). *Id.* Haig and
11 Associate admitted that they had interacted with Paddock on multiple occasions. *Id.* Their first
12 interaction with Paddock was on or about August 27, 2017, at a gun show in Las Vegas Nevada.
13 *Id.* Paddock browsed the ammunition samples at their booth and purchased forty to fifty (40-50)
14 rounds of .308 caliber incendiary ammunition. *Id.*

15 Haig and Associate's second interaction with Paddock was in early September 2017 at a
16 gun show in Phoenix, Arizona. *Id.* Haig stated that Paddock attempted to purchase bulk
17 ammunition and that they exchanged telephone numbers to coordinate a future transaction. *Id.*

18 Haig further stated that on September 19, 2017, he spoke with Paddock on the telephone
19 and arranged to complete an ammunition purchase that day. *Id.* Paddock arrived at Haig's
20 residence and purchased six hundred (600) rounds of .308 caliber (7.62mm) tracer ammunition as
21 well as one hundred and twenty (120) rounds of M196 .223 caliber tracer ammunition. *Id.*
22 According to Haig, he put the rounds in the Amazon.com shipping box, which law enforcement
23 officials found in Paddock's hotel rooms. *Id.* Haig noted that Paddock purchased the munitions
24 with cash and took the time to put on gloves prior to placing the box into the trunk of his vehicle.
25 *Id.*

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28 ¹ LVMPD Criminal Investigative Report of the 1 October Mass Casualty Shooting,
LVMPD Event No: 171001-3519.

1 The ATF and FBI agents asked Haig whether he manufactured the ammunition that he sold
2 to Paddock. (ECF No. 42). Haig repeatedly claimed that Lake City Army Ammunition Plant
3 manufactured the ammunition that he sold. *Id.* Haig also stated that he manufactures ammunition
4 only for his personal use. *Id.*

5 During these interviews, the agents observed reloading equipment in Haig's shop, which
6 was in the backyard of his residence located at 4323 East Encanto Street, Mesa, Arizona. (ECF
7 No. 1). Haig voluntarily provided the agents with a sample of ammunitions that he sells to
8 customers and claimed that the ammunition from the Las Vegas crime scene would not have his
9 tool marks. *Id.*

10 FBI investigators subsequently forwarded evidence from the Las Vegas crime scene to a
11 laboratory for forensic analysis. *Id.* The examination revealed that: (1) two rounds of unfired .308
12 caliber cartridges from Paddock's hotel rooms had Haig's fingerprints; (2) the cartridges had
13 reloading equipment tool marks; and (3) the cartridges contained armor piercing/incendiary
14 bullets. *Id.*

15 On October 19, 2017, the FBI obtained and executed a search warrant at Haig's residence.
16 *Id.* Law enforcement officials seized over one hundred (100) items, including live ammunition,
17 reloading equipment, and ammunition sales records. *Id.* Laboratory analysis confirmed that the
18 ammunition from Haig's residence was reloaded armor piercing ammunition and contained tool
19 marks consistent with the marks on the reloaded armor piercing rounds from Paddock's hotel
20 rooms. *Id.* Haig does not have a license to manufacture armor piercing ammunition. *Id.*

21 Analysis of the sales records revealed that Haig had engaged in over one hundred (100)
22 sales of armor piercing ammunition throughout the country. *Id.* Three of these sales were with
23 customers residing in the state of Nevada. *Id.* Law enforcement officials interviewed these
24 customers and discovered that two of the sales occurred in person at the Cashman Center in Las
25 Vegas, Nevada. *Id.* The third sale was an online transaction and the ammunition was shipped to
26 a residence in Elko, Nevada. *Id.*

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1 On August 22, 2018, a grand jury in the District of Nevada returned an indictment charging
2 Haig with one count of engaging in the business of manufacturing ammunition without a license
3 in violation of 18 U.S.C. §§ 922(a)(1)(B) and 924(a)(1)(D). (ECF No 10).

4 Throughout the investigation and the pending criminal proceeding, there has been
5 considerable publicity regarding Haig’s involvement to the October 1, 2017, shooting. On
6 multiple occasions Haig made various representations in the media regarding his business,
7 Specialized Military Ammunition (“SMA”), which is an Arizona limited liability company. (ECF
8 No. 42). Among these representations, Haig made statements regarding his awareness of laws
9 governing the sale of ammunition and that he runs SMA as a “strong hobby” rather than a business.

10 *Id.*

11 Now, Haig moves to dismiss the indictment pursuant to Federal Rule of Criminal
12 Procedure 12(b)(1) on the grounds that the charging statute, § 922(a)(1)(B), is unconstitutionally
13 vague. (ECF No. 45). Magistrate Judge Ferenbach recommends denying Haig’s motion. (ECF
14 No. 61).

15 **II. Legal Standard**

16 This court “may accept, reject, or modify, in whole or in part, the findings or
17 recommendations made by the magistrate.” 28 U.S.C. § 636(b)(1). Where a party timely objects
18 to a magistrate judge’s report and recommendation, then the court is required to “make a de novo
19 determination of those portions of the [report and recommendation] to which objection is made.”
20 28 U.S.C. § 636(b)(1).

21 Where a party fails to object, however, the court is not required to conduct “any review at
22 all . . . of any issue that is not the subject of an objection.” *Thomas v. Arn*, 474 U.S. 140, 149
23 (1985). Indeed, the Ninth Circuit has recognized that a district court is not required to review a
24 magistrate judge’s report and recommendation where no objections have been filed. *See United*
25 *States v. Reyna-Tapia*, 328 F.3d 1114 (9th Cir. 2003) (disregarding the standard of review
26 employed by the district court when reviewing a report and recommendation to which no
27 objections were made).

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1 **III. Discussion**

2 Haig has objected to Magistrate Judge Ferenbach’s report and recommendation. (ECF No.
3 62). The court accordingly conducts a *de novo* review of Haig’s motion to dismiss.

4 Federal Rule of Criminal Procedure 12(b) provides that “[a] party may raise by pretrial
5 motion any defense, objection, or request that the court can determine without a trial on the merits.”
6 Fed. R. Crim. P. 12(b)(1). A pretrial motion to dismiss is not the proper vehicle for a summary
7 trial on the evidence. *United States v. Boren*, 278 F.3d 911, 914 (9th Cir. 2002). *United States v.*
8 *Jensen*, 93 F.3d 667, 669 (9th Cir. 1996). Rather, courts adjudicate Rule 12(b) motions only when
9 they involve questions of law. *United States v. Schulman*, 817 F.2d 1355, 1358 (9th Cir. 1987).

10 In ruling on a pretrial motion to dismiss, “the district court is bound by the four corners of
11 the indictment.” *United States v. Lyle*, 742 F.3d 434, 436 (9th Cir. 2014). “If the pretrial claim is
12 substantially founded upon and intertwined with evidence concerning the alleged offense, the
13 motion falls within the province of the ultimate finder of fact and must be deferred.” *United States*
14 *v. Shortt Accountancy Corp.*, 785 F.2d 1448, 1452 (9th Cir. 1986) (quotes and citation omitted).
15 A district court can, however, make preliminary findings of fact necessary to decide questions of
16 law when doing so does not resolve issues properly left to the fact-finder. *Id*

17 Haig’s pretrial motion to dismiss includes both a facial challenge and an as-applied
18 challenge to the constitutionality of 18 U.S.C. § 922(a)(1)(B). *See* (ECF No. 45). Haig specifically
19 argues that the statute is unconstitutionally vague because it does not define “manufacturing,”
20 which is an essential term in the relevant statutory provision. *Id*. Both of Haig’s constitutional
21 challenges are questions of law that the court can adjudicate pursuant to Rule 12(b). *See United*
22 *States v. Harris*, 705 F.3d 929, 932–34 (9th Cir. 2013);

23 a. *Facial challenge*

24 A statute is unconstitutionally vague on its face when it “fails to provide a person of
25 ordinary intelligence fair notice of what is prohibited, or is so standardless [sic] that it authorizes
26 or encourages seriously discriminatory enforcement.” *Harris*, 705 F.3d at 932 (citing *United*
27 *States v. Kilbride*, 584 F.3d 1240, 1257 (9th Cir. 2009)). “Vagueness challenges to statutes which

1 do not involve First Amendment freedoms must be examined in the light of facts of the case at
2 hand.” *Id.* (brackets omitted) (citing *United States v. Mazurie*, 419 U.S. 544, 550 (1975)).

3 § 922(a)(1)(B) implicates freedoms under the Second Amendment because it prohibits
4 citizens from engaging in the business of importing or manufacturing, or in the course of such
5 business, transporting ammunition without a license. 18 U.S.C. § 922(a)(1)(B); Cf. *United States*
6 v. *Jimenez*, 895 F.3d 228, 232–36 (2nd Cir. 2018). Thus, because the court must address Haig’s
7 arguments in consideration of the facts in this case, Haig’s facial challenge collapses into his as-
8 applied challenge. See, e.g., *United States v. Schaefer*, No. 3:17-cr-00400-HZ, 2019 WL 267711
9 at *7-8 (D. Or. Jan. 17, 2019) (converting a facial challenge into an as-applied challenge).

10 b. *As-applied challenge*

11 Haig argues that § 922(a)(1)(B) is unconstitutionally vague as-applied because the statute
12 did not put him on notice that reloading cartridges with replacement parts constitutes
13 “manufacturing ammunition.” (ECF No. 45). The government contends that Haig’s motion is
14 improperly based on matter extrinsic to the indictment because he assumes that reloading
15 cartridges is the only conduct of manufacturing ammunition that the government intends to prove.
16 (ECF No. 63).

17 The indictment does not allege specific conduct in violation of § 922(a)(1)(B). See (ECF
18 No. 10). However, because both parties agree that the government will present evidence of Haig
19 reloading cartridges, the court holds that the government intends to prove that Haig violated §
20 922(a)(1)(B) by reloading ammunition.² See *Shortt Accountancy Corp.*, 785 F.2d at 1452 (allowing
21 courts to make preliminary findings when adjudicating a Rule 12(b) motion). Therefore, the court
22 will address Haig’s as-applied challenge.

23 A statute is unconstitutionally vague under the Due Process Clause of the Fifth Amendment
24 when “it ‘fails to put a defendant on notice that his conduct was criminal.’” *Harris*, 705 F.3d at
25 932 (brackets omitted) (quoting *Kilbride*, 584 F.3d at 1257). Statutes that provide for criminal

27 ² The court notes that this holding does not limit the government to proving that Haig
28 violated § 922(a)(1)(B) solely by reloading ammunitions. If the government presents evidence at
trial of other conduct which violates § 922(a)(1)(B), Haig will be able to file an appropriate motion
and assert as-applied challenges.

sanctions have an “enhanced” requirement to identify unlawful conduct. *Id.* “However, even applying this heightened requirement, due process does not require impossible standards of clarity.” *Kilbride*, 584 F.3d at 1257 (quotes and citation omitted).

§ 922(a)(1)(B) provides that it is unlawful for any person, “except a licensed importer or licensed manufacturer, to engage in the business of importing or manufacturing ammunition, or in the course of such business, to ship, transport, or receive ammunition in interstate or foreign commerce.” 18 U.S.C. § 922(a)(1)(B). The Gun Control Act, which contains the relevant statutory scheme, does not define “manufacturing” or otherwise limit the meaning of the term. *See generally* 18 U.S.C. § 921.

When a statute does not define a term, courts interpret that term in its plain and ordinary meaning. *United States v. Iverson*, 162 F.3d 1015, 1022 (9th Cir. 1998). The Ninth Circuit has not provided the plain and ordinary meaning of “manufacturing.” However, the Fourth Circuit held in *Broughman* that “manufacturing firearms” means assembling a firearm’s individual components so as to render the firearm suitable for use. *Broughman v. Carver*, 624 F.3d 670, 675 (4th Cir. 2010). The Fourth Circuit also identified the following related words: assemble, build, construct, refashion, and remake. *Id.*

A review of popular dictionaries confirms that the Fourth Circuit provided the plain and ordinary meaning of “manufacturing.” Merriam-Webster Dictionary defines the term as “to make into a product suitable for use” and Dictionary.com defines the term as “to make or produce by hand or machinery, especially on a large scale.”³ The court adopts these common definitions and holds that “manufacturing ammunition” under § 922(a)(1)(B) means assembling ammunitions’ individual components so as to render the ammunition suitable for use.

Reloading ammunition involves using various mechanical devices to punch used primers out of cartridge cases, forge primer pockets, expand cartridge mouths so the cartridges can accept new projectiles, and crimping bullets into cartridges. *See* (ECF No. 51). These acts involve

³ Merriam-Webster Dictionary, available at <https://www.merriam-webster.com/dictionary/manufacture> (accessed May 7, 2019); Dictionary.com, available at <https://www.dictionary.com/browse/manufacture?s=t> (accessed May 7, 2019).

1 significant machining and assembling. Thus, reloading ammunition falls within the statutory
2 category of “manufacturing ammunition.”

3 Although a plain reading of § 922(a)(1)(B) adequately identifies what conduct constitutes
4 manufacturing ammunition, the ATF has expressly announced on its website that a person who
5 reloads ammunition in the course of business must have a license as a manufacturer under 18
6 U.S.C. § 922(a) and 27 CFR 478.41.⁴ These public resources are sufficient to put Haig on notice
7 whether his conduct was unlawful. Indeed, it appears Haig received actual notice as his LinkedIn
8 profile states that he manufactures ammunition. (ECF No. 51-1).

9 Any residual allegations of vagueness in § 922(a)(1)(B) cannot amount to a constitutional
10 violation because the statute criminalizes only willful conduct. 18 U.S.C. § 924(a)(1)(D). When
11 a statute includes a *scienter* requirement, as is the case here, the law discourages arbitrary and
12 discriminatory enforcement by limiting the discretion of law enforcement officials. *United States*
13 *v. Wyatt*, 408 F.3d 1257, 1261 (9th Cir. 2005). Such a statutory scheme weighs against holding
14 that a statute is void. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). Thus, the mental state
15 requirement in § 922(a)(1)(B) ensures that the statute is not unconstitutionally vague.

16 **VI. Conclusion**

17 Accordingly,

18 IT IS HEREBY ORDERED, ADJUDGED, and DECREED that Magistrate Judge
19 Ferenbach’s report and recommendation (ECF No. 61) be, and the same hereby is, ADOPTED,
20 consistent with the foregoing.

21 IT IS FURTHER ORDERED that Haig’s motion to dismiss (ECF No. 45) be, and the same
22 hereby is, DENIED.

23 DATED May 8, 2019.

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27 UNITED STATES DISTRICT JUDGE
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4 Bureau of Alcohol, Tobacco, Firearms and Explosives, *available at* <https://www.atf.gov/firearms/qa/person-who-reloadsammunition-required-be-licensed-manufacturer> (accessed May 7, 2019).